

Settling the Syrian Conflict: Legal Pitfalls in a Political Agreement

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The planned Geneva conference will attempt to end the Syrian conflict with a political agreement. Such an agreement has to define a transitional order that accommodates the different groups' interests. Meanwhile, serious violations of international humanitarian and human rights law by government forces and the armed opposition continue to be documented and pose familiar questions regarding accountability and reparation. The result is well-known: actors that are essential to end the conflict are the ones that have been involved in abuses and are to be held accountable. Therefore, calls for justice, accountability and truth create incentives to resist the conclusion of and adherence to an agreement.



Legal Demands After Gross Human Rights Violations

In light of crimes such as torture, enforced disappearances, sexual violence, and mass killings demands for justice and accountability are prevalent. Transitional justice is the conceptual expression that responds to this demand by providing the tools to address a legacy of large-scale abuses, avoid impunity, ensure accountability, serve justice, realise reconciliation and guarantee memorialization. This set of tools – criminal prosecution, reparations, truth-seeking, vetting, dismissals and institutional reform – emerged in response to the different nature of each incident of abuse and appreciates the context-dependent nature of “justice”, “accountability”, and “reconciliation”. At the same time, a legal framework – in form of victim rights and state obligations – crystallized that sets out the minimum standards of such a response:

- victims' access to justice,
- the duty to impartially and promptly investigate violations,
- the right to truth about causes and circumstances pertaining to the victimization and the fate of victims,
- the reparative right to restitution, compensation, satisfaction and guarantees of non-repetition, and
- the duty to prosecute certain crimes.

A combination of transitional justice mechanisms adapted to the needs in Syria could realise these standards. However, to develop and implement a corresponding strategy requires several steps that undermine the political settlement of the conflict.

Documentation, preservation, and analysis of information related to crimes are legally required. So is the design of an adequate and proportional reparation and institutional

reform programme. At the same time, the state has to criminally prosecute certain crimes. All this incentivises perpetrators on both sides and their affiliates to avoid any commitment to these mechanisms.

Political Compromise and Its Potential Effects on Transitional Justice

A lack of explicit commitments is not the only way how a peace agreement might violate these minimum standards. The June conference – based on the Geneva communiqué – will negotiate additional questions that can prove decisive. Negotiated settlements often address a mixture of security, political, economic and territorial aspects and define how the power of the corresponding resources is shared in order to stop violence and de-escalate societal tension. When perpetrators or their supporters control these resources, they can obstruct transitional justice efforts and impair the state's ability to respond to abuses.

The communiqué's call for a transitional government will, in one form or another, entrench individuals from either side in government structures. This risks handing substantial political power to those responsible for crimes and enables them to frustrate efforts to address the past by, for example, granting amnesties.

Similarly, an agreement will likely define the future of the state security apparatus and the role of the armed opposition within it. As with political power, controlling security resources can enable the prevention of investigations and arrests or entail the power to break the peace.

Besides political and security questions, economic and territorial aspects of a compromise might equally frustrate transitional justice. Especially in view of the self-government concerns of the Kurdish, or even Alawite community, granting autonomy to certain areas might be necessary to reach an agreement, but will jeopardize comprehensive accountability by creating an uneven situation across the country.

Consequently, striking the necessary balance between enabling political compromise and upholding victim rights and accountability within a political agreement will define the conditions for success for transitional justice in Syria. Too wide-reaching provisions might prevent an accord. But discarding transitional justice altogether violates international law and fails to appreciate victims' needs. The question is then, without giving up on minimum standards, which provisions should be included in a political agreement?

Finding the Balance: Protect the Minimum, Enable the Maximum

As the complexities of negotiations prevent precise prescriptions, the main rationale that can be formulated is twofold: first, to ensure, at the minimum, the necessary conditions to elaborate a more detailed transitional justice strategy after the agreement and, second, to enshrine the maximum of immediate mechanisms that do not directly challenge core interests of the negotiating parties.

The crucial role of investigatory and documentation processes for other transitional justice mechanisms requires a firm commitment to seek, collect and preserve evidence. Enshrining the institutional set-up that can investigate in compliance with international

evidentiary and fair trial standards is a key step for transitional justice. For example, prosecution initiatives as well as truth-seeking require the preservation of documents and other evidence.

While the next step of truth-seeking – compiling and analysing information through, for example, a truth commission – might not be possible, truth in form of identification and location of the deceased and disappeared can be achieved without impairing the core interests of the negotiating parties.

In a similar vein, the duty to prosecute the most egregious crimes needs to be reflected by an accountability commitment within the agreement. This means that it might not be feasible to define the prosecutorial strategy or set-up of a criminal justice mechanism, but impunity for international crimes has to be legally excluded.

Lastly, reparation mechanisms should also mirror this twofold consideration. First, a general commitment to human rights and democratic standards as in the *Geneva communiqué* does not entail detailed vetting programmes. It can, however, be the basis for accountability in subsequent institutional reform processes. Second, reparative mechanisms not prohibitive for a political settlement should start immediately, for example, rehabilitation and compensation programmes, initiatives to acknowledge victimization or to prepare memorialisation.

The precise inclusion of these commitments in a settlement will be context-dependent at the time of agreement. They illustrate, however, that the variety of transitional justice mechanisms allows a flexible pursuit of transitional justice goals in a particular context without discarding them *in toto* on grounds of political realism. It is possible and necessary to meet some norms from the beginning and prepare the ground for further accountability efforts that appear prohibitive at the time of negotiation.

Bringing this legal perspective into the discussion about the political future of Syria might not only strengthen the position of victims within transition. It might also underline the limits to current behaviour and future discretionary competence of the players that aim to play a role in the political arena of post-conflict Syria. Overcoming the utopian picture of legal rights and duties as well as their light-minded sacrifice for political compromise might allow to more realistically manage expectations of both perpetrators and victims.

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